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Case at a Glance

Before 1993, Texas had to prove that a sex-offense victim had told a third person about the crime within six months of the alleged offense in order to convict a defendant based solely on the victim's testimony. This requirement did not apply, however, if the victim had been younger than 14 at the time of the offense. The law was changed in 1993 to make this exception available to victims who were under the age of 18. The Supreme Court is now asked to determine whether this change in the law can be applied to a defendant charged after 1993 with an offense that was committed prior to 1993.



Does the Ex Post Facto Clause Bar Texas From Retroactively Limiting the Need for Proof That a Sex-Offense Victim Made an "Outcry"?

by Rachel A. Van Cleave

PREVIEW of United States Supreme Court Cases, pages 136-139. © 1999 American Bar Association.

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In 1983, the Texas Legislature enacted an "outcry statute," which provided that a conviction for a sexual offense could be based solely on the testimony of the victim if within six months of the alleged offense the victim told a third person about the offense. Tex. Code Crim. Proc. art. 38.07. The provision set out an exception for victims who were under the age of 14 at the time of the offense; their testimony alone could support a conviction even if they had not told a third person within the required period of time.

The purpose of such a statutory provision seems to be twofold. First, the statute addresses the concern that sexual offenses, in particular, are easy to fabricate. Related to this is the belief that there is a greater chance that a victim would fabricate such an offense. Thus, the assumption underlying the statute is that if a victim made a timely outcry, it is less likely that the victim fabricated the occurrence of the offense. Second, such a statute has the effect of creating an exception to the rule against hearsay.

From the perspective of the prosecution, this is important because a jury may be unlikely to believe the victim unless there is evidence of a timely outcry. The statute allows the prosecution to bolster the credibility of the victim by introducing her out-of-court statements about the crime. In addition, however, where the victim is of a certain age and where the only evidence against the defendant is the victim's testimony, the statute *requires* evidence of an "outcry" by the victim.

The legislature amended this provision in 1993 to enlarge the scope of the exception such that the testimony of a victim under the age of 18 could support a sexual offense conviction even if the victim had not informed a third person of the incident within the requisite amount of time—which the amendment increased to one year.

ISSUE

Does retroactive application of the change in the outcry statute violate

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OF APPEALS



the ex post facto clause of the Constitution as a “law that alters the legal rules of evidence, and receives less, or different testimony” than required at the time of the offense? *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

FACTS

Petitioner, Scott Leslie Carmell, was charged with and convicted of eight counts of indecency with a child, five counts of sexual assault, and two counts of aggravated sexual assault. All counts involved one victim, KM, Carmell’s stepdaughter, and spanned a time period from February 1991, when KM was 12 years old, to March 1995, when she was 17. Carmell argues that four of those counts were based on incidents that occurred before the 1993 amendments to the outcry statute became effective, and when the victim was older than 14 but younger than 18 years of age. While the offenses took place before the 1993 amendments, the trial court applied the 1993 version of the statute, thus relieving the prosecution of the requirement that it present evidence of an outcry as to those counts, since KM was younger than the age of 18.

Carmell contends that under the 1983 version of the statute, he could not have been convicted on the four counts, because the state would have been required to present evidence that KM made a timely outcry as to each count, since she was 14 years of age or older at the time. Carmell claims that the retroactive application of the 1993 version of the outcry statute violated the ex post facto clause of the Constitution.

Carmell appealed to the Court of Appeals of Texas in Fort Worth. That court rejected Carmell’s ex post facto argument, stating that the 1993 version of the statute “does

not increase the punishment nor change the elements of the offense that the State must prove.” *Carmell v. State*, 963 S.W.2d 833 (Tex.App. – Fort Worth 1998, pet. ref’d) (per curiam). The Texas Court of Criminal Appeals refused Carmell’s petition for discretionary review. Given the appellate court’s holding rejecting the ex post facto law argument, the appellate court did not determine whether Carmell’s convictions on the four counts at issue were in fact based solely on the victim’s testimony. Thus, as a preliminary matter, the state argues that article 38.07 of the Code of Criminal Procedure is inapplicable because the State presented evidence in addition to that of the victim. While the Supreme Court could determine that Carmell’s conviction was based upon more than the testimony of the victim, this is unlikely. It seems that the purpose of granting certiorari in this case is to clarify the scope of the ex post facto clause.

The Supreme Court granted certiorari on June 14, 1998.

CASE ANALYSIS

Carmell’s arguments against the retroactive application of the 1993 version of the outcry statute raise the question of the proper scope of the ex post facto clause of the Constitution. The Constitution provides that “No state shall ... pass any ... ex post facto law.” Art. I, § 10. In *Calder v. Bull*, the United States Supreme Court made clear that this provision applied to retroactive penal legislation only and not to civil statutes. 3 U.S. (3 Dall.) 386 (1798). In addition, the Court set out the following categories of laws that the clause prohibits: (1) laws that criminalize conduct that was innocent when done; (2) laws that make a crime more serious than when it was committed; (3) laws that inflict greater pun-

ishment than provided for when the offense was committed; and (4) “every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender.” *Calder*, 3 U.S. at 390.

Carmell relies on the fourth category to support his argument that retroactive application of revised article 38.07 violated the ex post facto clause, and thus raises two questions. First, is the fourth category in *Calder* still a viable definition of an ex post facto law? If the fourth category is still applicable, the second issue relates to the scope of that category. That is, what standard are courts to use in determining whether a law comes within the fourth description of ex post facto laws?

Carmell argues that the 1993 change to the outcry statute essentially permitted the State to convict him on less evidence than the law required before 1993. Specifically, because the 1983 version would have required evidence of a timely outcry by KM, the lack of such evidence would have made his convictions on the relevant four counts impossible as a matter of law. In fact, there is Texas precedent for the proposition that where a conviction for a sexual offense is based solely on the testimony of the victim and there is no evidence of a timely outcry, the evidence is insufficient to support the conviction. See e.g., *Scoggan v. State*, 799 S.W.2d 679 (Tex. Crim. App. 1990) (defendant could not be convicted of sexual assault of a child solely on the testimony of the victim when the victim was older than 14 at the time of the offense and there was no evidence of outcry to a third person within six months of the offense).

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The State explains that the sexual offense charges brought against Carmell are based on statutes in effect at the time the offenses occurred, and that the elements of those statutes remained unchanged. The State then asserts that article 38.07 (either the 1983 or the 1993 version) has no impact on the elements of the sexual offenses involved, on any defenses to those offenses, nor on the State's burden of proving each element of the offenses beyond a reasonable doubt. The State further claims that Carmell's argument unduly expands the scope of *Calder's* fourth category.

Analogizing to an early case decided by the Supreme Court, *Hopt v. Utah*, 110 U.S. 574 (1884), the state of Texas claims that the effect of article 38.07 is simply to allow the jury to rely on evidence that it previously could not have considered in determining whether the defendant committed the crime. In *Hopt*, the Court rejected an ex post facto challenge to a law that eliminated a rule stating that convicted felons were incompetent to testify. The Court reasoned that the law "simply enlarge[d] the class of persons who may be competent to testify in criminal cases" and thus did not "alter the degree, or lessen the amount or measure" of evidence necessary to convict. 110 U.S. at 589. Similarly, in *Thompson v. Missouri*, 171 U.S. 380 (1898), the Court held that a change in a law that permitted admission of more circumstantial evidence against the defendant was not an ex post facto law. Such a law leaves "unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible." 171 U.S. at 387.

Carmell distinguishes *Hopt* and *Thompson* by focusing on the language in the fourth category of *Calder*, which refers to every law

that "alters ... and receives less ... testimony" than what was required at the time of the offense. In contrast to *Hopt* and *Thompson*, which involved laws that increased the amount of testimony and evidence that would be admitted and considered by a jury, the revision of article 38.07 that is at issue in the present case decreases the testimony required, in that it eliminates the requirement of the victim's outcry when the victim was younger than 18 at the time of the offense.

However, one response to Carmell's distinction between laws that admit previously inadmissible evidence and laws that eliminate the need for certain evidence is that this distinction asks the wrong question. Rather, the critical inquiry may be whether the law has the effect of altering the substance of the offense or merely alters the mode in which the trial is conducted or the nature of the evidence that may be received and considered.

This "procedural versus substantive" inquiry, however, is not always helpful. In fact, the Supreme Court has more recently stated that "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the ex post facto clause." *Collins v. Youngblood*, 497 U.S. 37, 46 (1990). Thus, the Court recognizes that some procedural laws might affect matters of substance. However, as one commentator has pointed out, the Court has yet to invalidate a retroactive change in an evidentiary rule. Nonetheless, since the Court has acknowledged the fact that substantive changes may be accomplished by evidentiary or procedural changes, it is unlikely to find that the fourth category in *Calder* is no longer applicable. As to the scope of the category, the Court has yet to create a standard for applying this distinction.

Laws eliminating corroboration requirements in another context have created a split among the lower courts. Where the jurisdictions involved had required that accomplice testimony be corroborated and later eliminated that corroboration requirement, the question was whether the retroactive application of the "no corroboration" rule violated the ex post facto clause. In *Murphy v. Sowders*, 801 F.2d 205 (6th Cir. 1986), cert. denied, 480 U.S. 941 (1987), the U.S. Court of Appeals for the Sixth Circuit held that the legislature did not violate the ex post facto clause when it retroactively applied a law that eliminated the requirement of evidence to corroborate an accomplice's testimony. The court reasoned that the prior law requiring corroboration was in effect a law like the one at issue in *Hopt*, which merely removed restrictions on the competency of certain types of witnesses, and therefore "simply enlarged the class of persons who were decreed to be competent to testify" and did not alter the prosecution's burden of proof. *Murphy*, 801 F.2d at 211.

The Third Circuit, however, came to a different conclusion as to precisely the same type of change in evidentiary rules. In *Government of the Virgin Islands v. Civil*, 591 F.2d 255 (3rd Cir. 1979), the court found a violation of the ex post facto clause when the repeal of the corroboration requirement for accomplice testimony was retroactively applied. In part, the court relied on language in prior Supreme Court cases that focused on whether a "substantial right" was involved. However, in *Collins*, the Court overruled those cases. 497 U.S. at 52. Nonetheless, in *Civil*, the Third Circuit also pointed out that the repealed statute had framed the corroboration requirement in terms of sufficiency of the evidence, similar



to the statute involved in Carmell's case. The statute in *Civil* provided that "No conviction may be had upon the testimony of an accomplice unless it be corroborated," thus indicating that the evidence would be insufficient as a matter of law where it consists solely of the accomplice's testimony. *Civil*, 591 F.2d at 257. In addition, several state courts are split on the issue of retroactive elimination of corroboration requirements. Carmell argues for an analysis similar to that of the court in *Civil*, while the state of Texas claims that the reasoning of the *Murphy* court is more consistent with the jurisprudence interpreting the ex post facto clause.

In addition to his arguments regarding the nature and effect of the 1993 revision to article 38.07, Carmell also argues that the Supreme Court should consider the purpose of the revision. Texas courts have stated that the purpose of the 1993 revision to article 38.07 was to make it easier to convict sex offenders. See e.g., *Bowers v. State*, 914 S.W.2d 213 (Tex. App. – El Paso 1996, pet. ref'd). Carmell argues that this is relevant because the purpose of the ex post facto clause is to protect against arbitrary, capricious, and vindictive lawmaking directed at unpopular groups. Thus, Carmell claims that sex offenders are an unpopular group targeted by the revision to article 38.07, and that retroactive application of such a statute therefore violates the ex post facto clause. This argument is unavailable in cases like *Murphy* and *Civil*, where the change in the evidentiary rule applied to all criminal cases and to accomplices called as witnesses for the prosecution as well as for the defense. In contrast, in the present case, the change in article 38.07 applies only to sexual offenses and only to the testimony of the victim, whom only the prosecution will call. The government

counters that the ex post facto clause is also aimed at ensuring that individuals have fair warning of what conduct is criminal. Where the change in article 38.07 did not alter the fact that Carmell's conduct with his stepdaughter was illegal, Carmell had fair warning of the criminal nature of his conduct. Nonetheless, these arguments do not address the pivotal procedural/substantive dichotomy.

SIGNIFICANCE

This case presents the Supreme Court with an opportunity to provide guidance to lower courts on the scope and meaning of the fourth category of ex post facto laws in *Calder*. As mentioned earlier, there is a possibility that the Court could eliminate that category altogether. Such an elimination could be based on the controversy surrounding the history of the category. In *Calder*, Justice Chase examined specific historical examples to which he matched each category. The state of Texas, the solicitor general, and some commentators argue that the example matched with the fourth category is in fact an example of a bill of attainder, not an ex post facto law. However, in *Collins*, the Supreme Court mentioned the debate surrounding the historical discussion but stated that the Court had and would continue to adhere to the views expressed by Justice Chase. *Collins*, 497 U.S. at 41 n.2.

Assuming the Court does not disturb the four categories set out in *Calder*, the next question is how the Court will apply that category. While the Court might dispense with the procedural/substantive dichotomy, this seems unlikely. Within the paradigm of that classification, the Court might continue to give meaning to it on a case-by-case basis, thus simply resolving the controversy involved in the type of corroboration statute at issue in

Carmell by comparing and contrasting it with the types of statutes considered in prior cases. Ideally, the Court will set out a standard for evaluating when a change in an evidentiary rule impacts the substance of an offense. Thus, it will be important for the Court to examine the policies underlying the ex post facto clause and decide whether the guiding policy should be the original one; that is, to guard against arbitrary and vindictive lawmaking by the legislature. *James v. United States*, 366 U.S. 213, 247 n.3 (1961). If so, then the Court will examine the purposes for the revision to article 38.07. Alternatively, the Court could state that providing fair warning to individuals that their conduct is criminal is the touchstone of the ex post facto clause. *Miller v. Florida*, 482 U.S. 423, 430 (1987).

Once the Court determines the dominant policy underlying the ex post facto clause, it must then decide whether that policy is offended by an evidentiary rule constructed as a standard for determining the sufficiency of the evidence to convict the defendant. That is, it must decide whether a statute that requires a specific type of corroboration of the victim's testimony (a timely "outcry" to a third person) merely relates to the method of proving the case, or whether it affects the substance of the offense.

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